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COMMENT

THE VESTING OF A DONEE BENEFICIARY'S INTEREST

INTRODUCTION

Although the great majority of jurisdictions in the United States have come to recognize the doctrine of third party beneficiary contracts,¹ there still remains considerable conflict as to the time at which the interest of the third party vests. The applicable rules are clear; however, the premises, if any,² from which the conclusions spring tend to be of a more subtle nature. Nonetheless, it would seem that any serious attempt to properly understand and evaluate these rules must be accompanied by an examination of the judicial thought from which they emanated.

The scope of this proposed mental survey shall be limited to an inspection of the interest of the donee beneficiary³ who was fully ascertained when the contract was executed. As such, there shall be no direct treatment of the status of the creditor beneficiary, mortgagee of an assuming subsequent grantee, incidental beneficiary, or donee beneficiary unascertained at the date of contract.

BASIC POSITIONS

The marked numerical majority⁴ adheres to the proposition that the original parties to the contract are at liberty to rescind, vary, or abrogate the contract without the consent of the donee at any time

¹ WILLISTON, CONTRACTS §357 (1936); 12 AM. JUR., CONTRACTS §277.

² Few recent decisions do more than merely recite the rule, for which reason the principal cases utilized in this article are for the most part drawn from earlier decisions. For example, see: *Riley v. Riley*, 118 Cal. App.2d 11, 256 P.2d 1056 (1953); *Robinson v. Occidental Life Ins. Co. of Cal.*, 131 Cal. App.2d 581, 281 P.2d 39 (1955); *Hamill v. Maryland Cas. Co.*, 209 F.2d 338 (10th Cir. 1954); *Nelson v. Nelson*, 116 N.E.2d 560 (1954), *rev'd on other grounds*, 233 Ind. 603, 121 N.E.2d 883 (1954); *Pliley v. Phifer*, 1 Ill. App.2d 398, 117 N.E.2d 678 (1954); *Rhodes v. Rhodes*, 266 S.W.2d 790 (Ky. 1953); *In re Disinterment of Body of Tow*, 243 Iowa 695, 53 N.W.2d 283 (1952).

³ RESTATEMENT, CONTRACTS §133 (1932) defines a donee beneficiary in the manner following: "(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in Subsection (3): (a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary . . ."

⁴ The following six states join the majority by legislation: CAL. CIV. CODE §1559 (1953, Deering); IDAHO CODE §29-102 (1947); MONT. REV. CODE §13-204 (1947); N. D. REV. CODE §9-0204 (1943); OKLA. STATS. tit. 12, §29 (1951); S. D. CODE §10-0204 (1952). There is limited legislation on the general subject in several other states, but the precise question of vesting is left to the judiciary. See CORBIN, CONTRACTS §835 (1950); and WILLISTON, CONTRACTS §365.

before the contract is accepted, adopted, or acted upon by the donee.⁵ Hence, if A (promisor) promises to pay D (donee) \$100 in exchange for B's (donor) promise to give A 10 shares of stock, A and B may mutually rescind the contract as long as D is ignorant thereof and does not accept the agreement. If, however, D accepts the promised benefit prior to rescission, then A and B are prohibited from rescinding the contract so as to deprive D of the promised \$100. In short, D's interest is rendered irrevocable when he accepts, adopts or acts upon the contract. Note, the rule is stated in the disjunctive, so that mere acceptance will operate to vest D's interest, and D need not also act in reliance on the contract, i.e., the rule operates independently of promissory estoppel.

The minority, on the other hand, prevents the original parties to the contract from modifying or rescinding the promised performance so as to deprive the donee of his interest, without the latter's consent, as of the moment the contract is entered into.⁶ Therefore, in the above example, A and B could not rescind the contract so as to deprive D of the promised \$100, although D was entirely unaware that the contract existed. It is, of course, apparent that within the holding of the minority the donee's interest vests the instant a valid contract for his benefit is made.

MAJORITY RATIONALE

Probably the most important single factor causing the majority to reject the concept of a vested interest accruing to the donee before he acquires any knowledge of the contract which has been made for his benefit, revolves around the question of the donee's consent to the benefit. The Iowa court outlined the general problem in stating:

"It may be the plaintiff was entitled to the benefits of the contract, but this depended upon the question whether he desired to avail himself thereof. He could not be forced to do so. Now,

⁵ *Right of Third Person to Enforce Contract between Others for his Benefit*, 81 A.L.R. 1271 (h), supplemented in 148 A.L.R. 359 without exhaustive coverage; *Mutual Rescission of Contract as Affecting Third Person Otherwise Entitled to Benefit of Contract*, 53 A.L.R. 178; 13 C.J. §625.

⁶ *Supra* note 5. RESTATEMENT, CONTRACTS §142 provides: "Unless the power to do so is reserved, the duty of the promisor to the donee beneficiary cannot be released by the promisee or affected by any agreement between the promisee and the promisor, but if the promisee receives consideration for an attempted release or discharge of the promisor's duty, the donee beneficiary can assert a right to the consideration so received, and on doing so loses his right against the promisor." See *Logan v. Glass*, 136 Pa. Super. 221, 7 A.2d 116 (1939) expressly adopting the Restatement view, and student comment thereon in 6 UNIV. OF PITTS. L.R. 52 (1939). Wisconsin is in general accord with the Restatement position, see: *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N.W. 440, 61 L.R.A. 509, 96 Am. St. Rep. 1003 (1903); *Fanning v. Murphy*, 126 Wis. 538, 105 N.W. 1056, 4 L.R.A. (N.S.) 666 (1906); *Sedgwick v. Blanchard*, 164 Wis. 421, 160 N.W. 267 (1916); *Micek v. Wamka*, 165 Wis. 97, 161 N.W. 367 (1917); *Menge v. Radtke*, 222 Wis. 594, 269 N.W. 313 (1936).

before he had knowledge any such contract was in existence, the parties who made it agreed on a valuable consideration to release the obligation thereby assumed. Having the power to enter into such a contract, it would seem to follow they could enter into another whereby the former ceased to be of any force or effect, unless in the meantime the person for whose benefit it was made in some manner has indicated he accepts the contract, or it can be implied he did so. By so doing he acquires the rights and assumes the burdens incident thereto."⁷

Besides indicating the necessity of consent—which, within the majority, cannot precede knowledge—on the part of the donee, this case indicates the alternative of either express or implied consent. Actually, this very possibility has occasioned a conflict within the majority. A faction of the majority refuses to indulge in any presumption whatsoever, and requires either the donee's express consent or some overt act indicative of same. For example, California treats the contract as an offer to the donee, which of course the donee may reject or accept—but apparently neither will be presumed, and if the donee is to prevent the principal parties to the contract from rescinding it, he must affirmatively accept the *offer*, mere silence being insufficient although accompanied by knowledge of the contract.⁸ A Kansas decision⁹ also suggests the parallel between a contract for the benefit of a third party and an offer, but quite realistically reaches a different result by presuming the third party's consent from the beneficial nature of the agreement.

It is somewhat difficult to perceive the practicality behind the extreme majority view which requires express consent. In the ordinary case the promised performance would consist of an unencumbered benefit, which would compel a presumption of consent or that the third party is a highly unusual person; and it would seem fallacious to base a general rule upon the expected reaction of the latter. Of course, it would be possible to present a benefit that is accompanied by a burden. For example, the promised performance might consist of the assignment of a claim that would require litigation to effect a satisfaction, or a conveyance of mortgaged property and by the terms of the contract, the donee must assume the mortgage.¹⁰ It is conceivable that the burdens could outweigh the benefits, in which case the donee could

⁷ *Gilbert v. Sanderson*, 56 Iowa 349, 9 N.W. 293, 41 Am. Rep. 103 (1881). Followed in *International Trust Co. v. Keefe Mfg. & Inv. Co.*, 40 Colo. 440, 91 Pac. 915 (1907).

⁸ *Stanley v. Robert S. Odell & Co.*, 97 Cal. App.2d 521, 218 P.2d 162 (1950).

⁹ "It is fundamental that an offer must be accepted as made before it becomes an enforceable contract. 13 C.J. 279. When an agreement is made by two or more parties for the benefit of a third, the rule is, of course, the same. Such an agreement, if beneficial to the third party, may be presumed to have been accepted by him . . ." *Wellman v. Knapp*, 126 Kan. 473, 268 Pac. 817 (1928).

¹⁰ WILLISTON, CONTRACTS §364 A; 17 C.J.S. §529.

reject the contract allegedly made for his benefit,¹¹ so that even if a rare situation of this type were to develop, the risk upon the donee would be negligible.

Aside from the question of consent, there are several other significant factors instrumental in molding the majority belief. As was previously mentioned, some courts approach a contract for the benefit of a third person upon the ground that it merely constitutes a *tender* or an *offer*.¹² A succinct example of this proposition is found in *Jordan v. Laverty*,¹³ where the court adopts the words of Mr. Bishop¹⁴ in declaring:

"Since a contract between two, in favor of a third, who had no part in it, is the mere tender of a benefit, the two can mutually rescind at any time before acceptance."

Clearly the rule is that an offer may be revoked at any time before it is accepted; further, rescission by the promisor and promisee would unambiguously manifest a revocation of their tender or offer to the donee. But it doesn't necessarily follow that rescission should be permissible prior to acceptance by the donee. The ordinary offer, which if accepted, results in an enforceable contract is not to be confused with the present situation. The ordinary offer is rendered irrevocable when the promisee supplies consideration to the contract by unconditionally accepting the offer. But the donee brings with him no consideration—that has already passed with the aggregation mentium of the original parties, and merely because the donee acquiesces in their agreement no further consideration is thereby introduced. It is difficult to see why the acceptance of the third party in this particular should be more significant than the acceptance of a proffered gift by the donee in the ordinary gift transaction. Certainly acceptance, with nothing more, in the latter situation would not bar the donor from revoking his promise; and if the tender or offer theory is to be utilized in justifying the presentation of a vested interest to the donee of a third party beneficiary contract upon his acceptance thereof, it would seem to be of rational necessity that the latter's acceptance be distinguishable from that of the donee of a promised *inter vivos* gift, yet no such difference appears. Hence, it would seem that perhaps a different approach to the problem would yield fruit of a less perishable nature.

¹¹ CORBIN, CONTRACTS §811; 12 AM. JUR., CONTRACTS §288.

¹² *Stanley v. Robert S. Odell & Co.*, *supra*, note 8; *Wellman v. Knapp*, *supra*, note 9.

¹³ *Jordan v. Laverty*, 53 N.J.L. 15, 20 Atl. 832 (1890); *aff'd in* People's Bank & Trust Co. v. Weidinger, 73 N.J.L. 433, 64 Atl. 179 (1906) *aff'd in* Camden Trust Co. v. Haldeman, 133 N.J.E. 427, 33 A.2d 611 (1943);—S—136 N.J.E. 261, 40 A.2d 601 (1945).

¹⁴ BISHOP, CONTRACTS §1223 (1887).

The Kansas court in *Stanfield v. W. C. McBride, Inc.*¹⁵ suggests that *common sense* dictates that a contract for the benefit of a third person is rescindable prior to knowledge thereof by the donee. Although the case is actually concerned with an unascertained beneficiary, the court used language broad enough to include the ascertained donee in commenting:

"Suppose A and B enter into a contract for the benefit of C. Suppose further that C never knew of the agreement between A and B, and therefore had placed no reliance on such contract, and in nowise had changed his position. Is the contract between A and B, the moment executed, like the laws of Medes and Persians—no longer subject to change? Does the contract upon its completion become a finality that forbids the touch of the contracting parties? Is the contractual status of the parties immutably fixed? Before A and B are permitted to change or abrogate their agreement must they of necessity secure consent of the third party C, who, until then, is a stranger to the contract, and at all times a mere windfall volunteer? To hold that the moment that A and B enter into an agreement for the benefit of C, that such third party C has at that moment and under all circumstances acquired an interest in the contract which is indefeasibly vested, is an *affront to common sense*." (emphasis added).

The reasoning of this case superficially appears to be as sound as it is forceful. Certainly it is unimpeachable within the realm of the unascertained donee. For instance, assume a father (F) and son (S) enter into a contract whereby S is to manage F's farm for one month, in return for F's promise to give S's wife (W) a dozen eggs each week for 5 years, commencing with the date of the marriage. If at the time S is neither married nor engaged, it would clearly be an "affront to common sense" to maintain that F and S could not rescind the contract on the ground that W, as yet a totally unascertained and possibly non-existent donee, has a vested interest in the eggs. But is this same appeal to common sense applicable to the case of the ascertained donee? It is true that if the donee never learns of the contract, nor the rescission thereof, that he will not perceive a loss—but is that the criterion on which to base the rule? It will be seen that the vested interest of neither the cestui que trust, nor the donee of a gift, nor the third person that contracts with the agent of an undisclosed principal, nor the beneficiary of a life insurance policy, nor the transferee of a property interest is made to depend upon the knowledge or awareness of the party. Is it common sense to say that a person cannot have a vested interest unless he is in a position to appreciate its loss in the event it is rescinded? Or would it not be more sensible to consider the acts of the parties creating the interest? The donee takes

¹⁵ 149 Kan. 567, 88 P.2d 1002 (1939).

the contract subject to any terms contained therein,¹⁶ which would include a provision reserving to the original parties to the contract the power to rescind the contract if they mutually so desire.¹⁷ If instead of so reserving this power, the donor enters into an unconditional contract whereby the promisor is to perform some act for the benefit of the donee, then the donor has not only unconditionally expressed his intent, but even further, has done all that is within his power to secure the promise. If in the preceding example, S was married at the time of the contract, but W was ignorant of the contract, then no further act by S is required to vest W's interest. Admittedly, S must manage F's farm for a month—but that performance is owing to F, not to W and in and of itself will not benefit W. Also admitted is the fact that at the time of the contract, W has not received the promised performance—but S is not giving the eggs to W; instead, S is presenting to W an enforceable contractual right to obtain the eggs from F, who is in no sense a donor. Hence, it is apparent that in effect S is giving W merely a contractual right,¹⁸ and nothing remains for him to do in order to consummate the gift.¹⁹ Would it not be more appealing to common sense to vest the donee's interest at this time, rather than permitting the donee's knowledge and acceptance to mysteriously play the role of a legal catalyst?

The final major attempt by the majority to vindicate their position is that it is *fair and just* to permit the promisor and promisee to rescind the contract prior to the donee's knowledge and acceptance thereof. An early Rhode Island case²⁰ dealing with a creditor beneficiary appears to suggest that the justice of the rule rests upon the assumption either that "no third person had acquired any right under it," or that the third party has lost nothing since he still has his claim against the promisee. If the former assumption is adopted, it would appear to be mere question begging since obviously there is no injustice if the third party had no right, but the very point in issue is whether in fact he does have such a right; if instead, the court is relying upon the

¹⁶ 17 C.J.S. §529.

¹⁷ RESTATEMENT, CONTRACTS §142. See *Sedgwick v. Blanchard*, 170 Wis. 121, 174 N.W. 459 (1910).

¹⁸ See WHITTIER, *Contract Beneficiaries*, 32 YALE L. J. 790 (1923); CORBIN, CONTRACTS §814.

¹⁹ See *Pliley v. Phifer*, *supra*, note 2.

²⁰ "That the contract was in origin simply a contract between the defendant (promisor) and Tibbets (debtor-promisee), and, of course, they had power, having made it, to unmake it, by release or otherwise, so long as no third person had acquired any right under it (After rescission) . . . there was then no contract to which the plaintiffs (creditor beneficiaries) could accede. The ground of action had been extinguished. The plaintiffs cannot complain of this, if they had not previously acceded, since until their accession the contract was simply between the defendant and Tibbets, and could be annulled by them without any injustice to the plaintiff; their claim against Tibbets remaining unaffected." (parenthesis added). *Wood et al. v. Moriarty*, 16 R.I. 201, 14 Atl. 855 (1888).

latter assumption, then an evaluation of the validity of this mental maneuver would be rendered more intelligible by considering it in connection with a more recent federal case²¹ applying New York law, wherein it is set forth that:

"In any event, New York enforces third party beneficiary contracts because it is 'just and practical' to do so—not because of any technical rules of legalism. Consequently, analogies to insurance and property law seem to be of little help. That the majority rule satisfies the equitable principles of the theory adopted by New York courts and is entirely practical seems free from doubt. No one has suggested any cogent reason why the rights of a donee beneficiary should be any more sacrosanct than the rights of a creditor beneficiary, and there is nothing to indicate that the New York courts would make any distinction in their rights when a rescission has taken place."

Although attempting to justify the majority holding upon a theory of justness, these two cases appear to suggest the very reason why it would be unjust to utilize the rule. In the first place, it should be noted that for the purposes of rescission the courts quite generally fail to make any distinction between a creditor and a donee beneficiary.²² Such is expressly stated in the New York decision, and the same result is at least impliedly attained in Rhode Island by considering subsequent cases in that jurisdiction.²³ The operation of the majority rule is not unjust in the case of a creditor beneficiary because the third party retains his claim against the debtor, the promisee, after the rescission; however, the case is far different if instead of a creditor, a donee beneficiary is involved. In that event, the third party has no other right to fall back upon in the event the contract is rescinded, because his sole right or interest, if any, arises from the contract entered into for his benefit. However, any adverse comment upon the mode selected by these cases to attain the result of the majority should not be construed to be a criticism of the rule itself. The discussion on this point is certainly not adequate to indicate what is just, ergo when the donee's interest should vest; rather, it is merely suggested that the conclusion and premise have gotten mislocated when it is stated, as in these cases, that it is "fair and just" because in effect the interest is not vested.

²¹ *McCulloch v. Canadian Pac. Ry. Co.*, 53 F. Supp. 534 (D.C. Minn. 1944).

²² "It will be noted that the courts, in discussing the rights of the parties to rescind the contract, whether before or after its acceptance by the beneficiary, make no distinction between the creditor-beneficiary and donee-beneficiary." 81 A.L.R., *op. cit. supra*, note 5, at 1294. Also see WILLISTON, *CONTRACTS* §396 B.

²³ See for instance *Blake v. Atlantic Nat. Bank*, 33 R.I. 464, 82 Atl. 225, 39 L.R.A. (N.S.) 874 (1912), wherein the principal case is cited.

MINORITY RATIONALE

The leading Wisconsin case of *Tweeddale v. Tweeddale*²⁴ attempts to sustain via *contractual logic* the concept that immediately upon the execution of the contract the donee has a vested interest regardless of the knowledge of the third party in observing:

"The liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent. It is plainly illogical to hold that, immediately upon the completion of the transaction between the immediate parties thereto, the law operates upon their acts and creates the element of privity between the promisor and the third person, and at the same time to hold that such third person's status as regards the promise may be changed thereafter without his consent."

This would certainly be a succinct, albeit reasonable, solution if in fact it could rationally be established that the law creates the element of privity between the promisor and donee, as well as between the promisor and promisee, *eo instante* with the contractual formation. However, it is difficult to see how or why the donor enters into the privity picture at all. The donee can scarcely be in privity with the promise, since he was not the promisee; nor can the donee claim privity by virtue of the consideration since that was the contribution of the donor, not the donee.²⁵ If there can be no enforceable contract right in the absence of privity, then if the donee is to ever acquire a vested interest, the law must at some point create privity. Since, however, such created privity would amount merely to a legal fiction, presumably it could be declared to arise upon the donee's acceptance of the contract²⁶ as readily as at the promisor's acceptance. In short, the artificiality of this situation could well lead one to disregard any discussion of privity in attempting to arrive at a conclusion in this particular area.²⁷

Apparently the majority and minority are in accord in at least one respect as regards the vesting of the donee's interest: once the promised performance has been *accepted* by the donee, it cannot thereafter be revoked without his consent. But, to the conflict already presented within the majority, that is, must the donee's acceptance be express or implied after he learns of the contract for his benefit, the minority adds a third alternative—the acceptance of the donee may be presumed the instant the contract is created, regardless of the donee's

²⁴ *Supra*, note 6.

²⁵ WILLISTON, CONTRACTS §357.

²⁶ See *Johnson v. Central Trust Co.*, 159 Ind. 605, 65 N.E. 1028 (1903) so holding.

²⁷ 81 A.L.R., *op. cit. supra*, note 5, at 1284; WILLISTON, CONTRACTS §357.

knowledge thereof. The Ohio court²⁸ neatly offered this approach in proclaiming:

"... even though she had no knowledge of its existence or formally accepted the same—her assent as a donee beneficiary there-of being presumed."

The implication is clear and difficult to rebut—how can you seriously presume anything but acceptance to an unencumbered gift?²⁹

One jurisdiction presents an unusually interesting opportunity to examine this question of consent in that they are in accord with the extreme majority viewpoint in refusing to assume any sort of consent for adults,³⁰ and yet for minors they not only presume consent, but do so before he is aware of the promised benefit.³¹ In *Johnson v. Central Trust Co.*,³² the Indiana court declared the strict rule as applicable to adult donees, but the very same year found the Appellate Court of Indiana reaching an opposite result in favor of an infant donee in stating:

"But the rule prevails that, where the gift is entirely beneficial to the donee, his acceptance of it will ordinarily be presumed unless the contrary appears Thus, where a gift is made to a minor, who, in law, is presumed to be incapable of exercising a sound discretion over his affairs, if the gift is for his advantage, the law will accept it for him."³³

Hence, the distinction between infants and adults appears to rest upon the ground that the former is not deemed capable of exercising sound discretion and might, therefore, reject the contract. Admittedly, such a contingency is well within the realm of possibility, for an adult or a minor; but when the court proclaims that the law will therefore step in and protect the infant from his own indiscretion by entering an acceptance for him, they are at least tacitly asserting that any person—minor or adult—of sound discretion would accept the contract for

²⁸ *Rohrbacker v. Citizens Bldg. Co.*, 40 N.E.2d 157 (Ct. of App. of Ohio 1941).

²⁹ See: *In re Staver's Estate*, 218 Wis. 114, 260 N.W. 655 (1935) so holding.

³⁰ *Richards v. Reeves*, 45 N.E. 624, *rev'd on other grounds*, 149 Ind. 413, 49 N.W. 348 (1898).

³¹ *Pruitt v. Pruitt*, 91 Ind. 595 (1883); *Bershire Life Insurance Company v. Hutchings et al.*, 100 Ind. 496 (1884); *Waterman v. Morgan*, 114 Ind. 237, 16 N.E. 590 (1888); *Copeland v. Summers*, 138 Ind. 219, 35 N.E. 514, & 37 N.E. 971 (1898) (1894).

³² "But in no case does the contract become the contract of such third person, creating a liability in his favor, until by some overt act or acceptance, either by suit or otherwise, as the circumstances may admit of, he elects to make the contract his It is the law that creates the necessary privity, upon the acceptance of such third party, and he thereby secures the advantages and must bear the burdens that belong to him as a party to the contract." *Supra*, note 26.

³³ *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, 67 N.E. 232 (1903). Although the case dealt with an inter vivos gift, it was the following year cited as authority for the rule on infant donee beneficiaries in *Johnson v. Staley*, 32 Ind. App. 628, 70 N.E. 541 (1904). Accord: *Rhodes v. Rhodes*, 266 S.W.-2d 790 (Ky. 1953).

his own benefit. Nevertheless, the same jurisdiction hesitates to make the same assumption when dealing with an adult, and in so doing apparently suggests by implication that they will not presume an adult donee to be possessed of sound discretion. Such a holding would certainly raise serious doubt as to the wisdom upon which it is based.

There is, however, within the minority holding that acceptance will be presumed notwithstanding the assenter's lack of knowledge in the matter, one rather troublesome aspect, to-wit: how can consent validly be presumed where in fact it would be impossible for the party himself to consent since his knowledge of the whole affair is nil? This precise problem is equally applicable to numerous other legal areas that are quite analogous to a third party contract, and appears to offer no serious obstacle.

No one would question the result where the donor of an inter vivos gift surrenders a chattel without reservation of dominion or control to a third party to hold for the donee—clearly that would evince the donor's present intent to bestow an unconditional gift, and the donor would thereafter be unable to reclaim the chattel although the donee was not yet aware of the consummated gift.³⁴ A transfer of real property, as well as personal property, may be effective to endow the donee with a vested interest, although he is not aware of the transfer.³⁵ An interesting comment in a Texas case³⁶ presents an insight into the practical philosophy of such a holding:

"As a rule of reason and common sense, a delivered instrument plainly amounting to a deed of gift should operate by a presumed assent until a dissent or disclaimer appears."

It would appear, therefore, that the rule of consent applicable to property transfers is in essence identical with that of the minority in re third party beneficiary contracts; however, before any conclusion based upon consistency can be drawn, an examination into the basic similarity of the two fields is requisite.³⁷ In the property domain, there must be some formality in order for the donee to obtain an irrevocable interest. Delivery is the usual means of accomplishing this formality, but it need not necessarily be actual delivery of the object of the gift, as in many cases constructive delivery, or indorsement of choses in action will suffice. Basically, what is required is some method whereby the intent of the donor can clearly be ascer-

³⁴ In *Re Tardibone's Estate*, 196 Misc. 738 (Surr. Ct.), 94 N.Y.S.2d 724 (1949).

³⁵ 26 C.J.S. 698; *Moore v. Trott*, 162 Cal. 268, 122 Pac. 462 (1912); *Taylor v. Sanford*, 108 Tex. 340, 193 S.W. 661 (1917); In *Re Tardibone's Estate*, *supra*, note 34.

³⁶ *Taylor v. Sanford*, *supra*, note 35.

³⁷ See WHITTIER, *op. cit. supra*, note 18, at 795, for an excellent discussion of the validity of this proposition. Accord: WILLISTON, *CONTRACTS* §396; CORBIN, *CONTRACTS* §814; *Pruitt v. Pruitt*, *supra*, note 31; In *Re Staver's Estate*, *supra*, note 29. Contra: *McCulloch v. Canadian Pac. Ry. Co.*, *supra*, note 21.

tained. It would seem that the making of the contract for the donee's benefit should be sufficient to satisfy the necessity of some formality to clearly evince the promisee's intention. By so doing the donor plainly declares his intention, and does all within his means to relinquish dominion and control—for even in the majority, it is no further act of the donor, but rather that of the donee, i.e., acceptance, that settles the matter. The similarity of the two fields as regards the donee's acceptance seems too obvious to mention, however, it is significant to note once again that property law assumes such consent until the contrary is indicated regardless of the donee's knowledge as a matter of "reason and common sense"—and no valid reason appears why such reason and common sense is not equally applicable to the third party beneficiary.

The law of trusts also presents an analogous situation, and is equally clear in declaring that the question of revocability does not depend upon the knowledge of the cestui que trust.³⁸ In fact, notice and acceptance are immaterial in the event of a beneficial trust.³⁹ Acceptance is presumed notwithstanding the beneficiary's lack of information⁴⁰ and the settlor is restrained from revoking the trust⁴¹ just as the principal parties to a contract for the benefit of another are prevented from rescinding in the minority holding. It is particularly interesting to note that the same court which considered it an "affront to common sense" to concede that the donee beneficiary is presented with an indefeasible interest the moment the contract for his benefit is executed,⁴² now finds itself content with the belief that the cestui que trust's consent is to be presumed—irrespective of his knowledge of the deed of trust—until the contrary is shown.⁴³

A policy of life insurance goes beyond the realm of being merely a closely analogous situation, because in essence it is but a species of a third party beneficiary contract, but nonetheless it has evolved as a separate entity. Once again the rule in this domain is identical with that of the minority in that the moment⁴⁴ the policy is issued, the insured has no power to discharge the right of the beneficiary,⁴⁵ unless

³⁸ *In re Prudence Co.*, 24 F. Supp. 666 (E.D. N.Y. 1938), and cases there cited.

³⁹ BOGERT, TRUSTS §172 (1951) and cases there cited.

⁴⁰ *Id.* at §171.

⁴¹ RESTATEMENT, TRUSTS §36 (1935).

⁴² *Stanfield v. W. C. McBride, Inc.*, *supra*, note 15.

⁴³ "It will be presumed on the part of the beneficiary under a deed of trust, in the absence of proof to the contrary, that each accepts the provisions made for his benefit, and such acceptance may be given at any time after the conveyance is made, unless renounced or waived; and such acceptance, in fact, will relate back to the day of registration." *First Nat. Bank v. Ridenour*, 46 Kan. 707, 27 Pac. 150 (1891).

⁴⁴ See *Merchant's Bank v. Garrard*, 158 Ga. 867, 124 S.E. 715, 38 A.L.R. 102 (1924); and *Richer v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 6 N.W. 771 (1880), stressing this point.

⁴⁵ In Wisconsin the insured in a policy of life insurance is at liberty to assign the policy, or change the beneficiary without the consent of the latter.

the power to do so is reserved.⁴⁶ One case⁴⁷ quite unambiguously expresses the belief that the donee's interest is not comparable to that of the insurance beneficiary upon the ground that:

"First, it may be observed that insurance law is peculiar to itself. There has grown up in that field principles of law which are not applicable elsewhere. Public policy and the relationship between the parties largely have influenced the rule with reference to the change of beneficiaries in a life insurance contract. Therein, because of the peculiarity of the law, a beneficiary has a vested interest in absence of the right to change beneficiaries."

However, unless the function of law is to be reduced to the creation of arbitrary rules, it would not seem unreasonable to expect similar rules appearing in related fields. Further, it is hoped that the present discussion of analogous areas has made it apparent that the principle of presumed consent is neither unique to insurance law, nor dependent upon the relationship of the parties.

A parallel also exists in the law of agency, although the analogy is probably more strained than in the previously presented fields. Consider, for instance, the effect where an agent (promisee) of a totally undisclosed principal (promisor) enters into a contract with a third party (donee). Although the third party was unaware of the principal's existence at the time of contracting, the third party may nonetheless elect to hold the principal as a party to the contract if the agent was acting within his authority,⁴⁸ unless by the terms of the contract a

Slocum v. Northwestern National Life Insurance Co., 135 Wis. 288, 115 N.W. 796, 14 L.R.A. (N.S.) 1110, 128 Am. St. Rep. 1028 (1908); *Boehmer v. Kalk*, 155 Wis. 156, 144 N.W. 182, 49 L.R.A. (N.S.) 487 (1913); *Northwestern Mutual Life Insurance Co. v. Adams*, 155 Wis. 335, 144 N.W. 1108 (1913); *Beck v. First Nat. Bank of Madison*, 238 Wis. 346, 298 N.W. 161 (1941). But this exception to the general rule is said to be the product of stare decisis and will not venture beyond the confines of life insurance. *Tweeddale v. Tweeddale*, *supra*, note 6; *Severson v. Milwaukee Auto Ins. Co.*, 265 Wis. 488, 61 N.W.2d 872 (1954). Further, under Wis. STATS. (1953), §246.09, if the beneficiary is a married woman the rule reverts to the general holding in Wisconsin and the beneficiary may not be divested of her interest without her consent. *Ellison v. Straw*, 116 Wis. 207, 92 N.W. 1094 (1903); *Christman v. Christman*, 163 Wis. 433, 157 N.W. 1099 (1916); *Truelsch v. Northwestern Mut. Life Ins. Co.*, 186 Wis. 239, 202 N.W. 352, 38 A.L.R. 914 (1925); *Oldenburg v. Central Life Assur. Soc.*, 243 Wis. 8, 9 N.W.2d 133 (1943); *Hott v. Warner*, 268 Wis. 264, 67 N.W.2d 370 (1954).

⁴⁶ *Right of Life Insured to Assign Policy Without Beneficiaries Consent*, 60 A.L.R. 191; 29 AM. JUR., Insurance §1275; 32 C.J. §449. Even in Wisconsin the insured may effect a divestment of the married woman's interest without her consent if the power to do so is reserved. *Hilliard v. Wisconsin Life Insurance Co.*, 137 Wis. 208, 117 N.W. 999 (1908); *National Life Ins. Co. of United States v. Brautigam*, 163 Wis. 270, 273, 154 N.W. 839, 157 N.W. 782 (1915) (rehearing 1916); *Christman v. Christman*, *supra*, note 45; *Watkins v. Watkins*, 210 Wis. 606, 245 N.W. 695 (1932); *Oldenburg v. Central Life Assur. Soc.*, *supra*, note 45; *Hott v. Warner*, *supra*, note 45.

⁴⁷ *McCulloch v. Canadian Pac. Ry. Co.*, *supra*, note 21.

⁴⁸ RESTATEMENT, AGENCY §186 (1933); *Exceptions to Rule Which Permits Suit by or Against Undisclosed Principal*, 130 A.L.R. 666; 2 AM. JUR., Agency §394.

principal was specifically excluded,⁴⁹ or the instrument was negotiable⁵⁰ or under seal.⁵¹ Admittedly, the third party is not a donee in the sense that he is receiving performance of the contract without any reciprocation on his part and in exchange for his promised performance he receives but one enforceable contractual right, and even more significant, it is impossible to find a donor, i.e., a person who intended to confer a benefit upon the third party; but he is presented with an option to look to one of two people, that is, he is given a promisor for which he has not bargained. The advantage of this phenomenon is apparent if you consider the case of a third person selling on credit to an agent who subsequently becomes insolvent. If it were not for the appearance of a financially responsible principal, the third party would have but a valueless claim—so in a sense the third party is a donee in that he is given an unbargained for principal to substitute in the place of a financially defunct agent. Professor Ferson presents a rather well phrased insight into the similarity in writing:

"When an agent makes a contract for an undisclosed principal the transaction is, in many respects, like the making of a contract for the benefit of a donee-beneficiary who is unaware that the contract is being made. In one case and in the other the obligor consents to be bound; the obligee gets, without knowing it, a right against the obligor; and yet the right of the obligee is genuine and vested. In other words the obligee's right is no less vested *just because he does not know he has it.*"⁵² (emphasis added).

It has undoubtedly become apparent that a common strain runs through these fields related to a beneficiary contract, to the effect that either the consent of the party to be benefited is not the vital factor, or that consent should be presumed until the contrary is indicated. Either possibility would be consistent only with the doctrine of the minority.

CONCLUSION

The majority has erroneously placed the emphasis upon the donee's acceptance of the contract for his benefit, since he is but an unreciprocating recipient of a benefit, and as such should not be empowered to cause the vesting of his own interest.

It is suggested that the question be resolved on the plane of the donor's acts, who after all is the creator of the interest. Such a recourse would leave neither party in a precarious position: the benefit could neither be forced upon the donee since he, of course, has the power of rejection; nor could the promised gift be stripped prema-

⁴⁹ RESTATEMENT, AGENCY §189.

⁵⁰ *Id.* at §192.

⁵¹ *Id.* at §191.

⁵² FERSON, AGENCY, §169 (1954).

turely from the control of the donor, since the promisor and promisee can reserve the power to rescind the promised gift. But in the absence of either, it is urged that common sense, practicality, and rules of law from analogous fields dictate that the donee beneficiaries' interest should vest the moment a contract for his benefit is created.

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